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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. A-12 (76-1427)

REV. PAUL A. McDANIEL,
Appellant,

v.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR. as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

On Appeal from the Supreme Court of Tennessee

BRIEF FOR APPELLANT

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On Appeal from the Supreme Court of Tennessee

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the Tennessee Supreme Court is reported at 547 S.W. 2d 897 (Tenn. 1977).

JURISDICTION

The jurisdiction of the Supreme Court to review the final judgment of the Supreme Court of Tennessee is conferred by 28 U.S.C. § 1257(2). *See Torcaso v. Watkins*, 367 U.S. 488 (1961); *Sherbert v. Verner*, 374 U.S. 398 (1963).

QUESTIONS PRESENTED

I. Whether the legislative call for a limited constitutional convention (1976 Tennessee Public Acts, Chapter 848, Section 4 establishing the qualifications of delegates as the same as those for membership in the House of Representatives, thus invoking the Tennessee Constitution, Article IX, Section 1) deprives appellant of the free exercise of religion guaranteed by the First and Fourteenth Amendments of the United States Constitution.

II. Whether the legislative call for a limited constitutional convention is an establishment of religion in violation of the First and Fourteenth Amendments of the United States Constitution.

III. Whether the legislative call for a limited constitutional convention deprives appellant of the right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment.

IV. Whether the legislative call for a limited constitutional convention deprives appellant of the right to be a candidate for public office in violation of the Equal Protection Clause of the Fourteenth Amendment.

V. Whether the legislative call for a limited constitutional convention deprives appellant of due process of law secured by the Fourteenth Amendment of the United States Constitution in that the Tennessee Constitution, Article 9, Section 1 is unconstitutionally vague.

VI. Whether the legislative call for a limited constitutional convention imposes a religious test as a qualification for office or public trust in violation of the United States Constitution, Article VI, Clause 3.

STATUTES INVOLVED

Tennessee Constitution, Article IX, Section 1, the validity of which is drawn in question, provides:

> "Ineligibility of ministers and priests to seats in legislature. —Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature".

The provisions of the Tennessee Constitution, Article IX, Section 1, were made applicable as a qualification for election to the 1977 limited constitutional convention of Tennessee by 1976 Tennessee Public Acts, Chapter 848, Section 4, which provides:

> "Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his representative district".

STATEMENT

Appellant, Reverend Paul A. McDaniel, pastor of the Second Missionary Baptist Church in Chattanooga, Tennessee filed as a candidate for delegate to the 1977 limited constitutional con-

vention from the 29th House District of Tennessee. On September 28, 1976 Selma Cash Paty, one of the appellees here, filed suit in the Chancery Court of Hamilton County against appellant and certain of the appellees requesting a declaration that appellant was disqualified to serve as delegate and an order striking appellant's name from the ballot under 1976 Tennessee Public Acts, Chapter 848 and the Tennessee Constitution, Article IX, Section 1.

The Chancery Court of Hamilton County on October 5, 1976 declared appellant eligible to seek the office of delegate and invalidated on First and Fourteenth Amendment grounds the provisions of 1976 Tennessee Public Acts, Chapter 848, and the Tennessee Constitution, Article 14, Section 1 as applied to appellant's candidacy for or service as delegate at the 1977 limited constitutional convention.

An appeal was taken to the Tennessee Supreme Court which on October 15, 1976 was remanded for failure of the record to reflect that the state attorney general had been made a party or served in accordance with Tennessee Code Annotated § 23-1107 and Rule 24.04 of the Tennessee Rules of Civil Procedure.

On October 21, 1976 appellant filed an amended answer and cross-complaint naming additional of the appellees as defendants in this case and seeking further relief under 42 U.S.C. 1983. The Chancellor certified appellant's amended answer and complaint as a class action on October 22, 1976. The answer of appellee Selma Cash Paty to appellant's amended answer and cross-complaint was filed October 22, 1976.

The Chancery Court of Hamilton County on October 22, 1976 again declared appellant qualified to seek the office of delegate to the 1977 limited constitutional convention from the 29th House District of Hamilton County and on October 25, 1976 entered final judgment and an order granting an appeal to the Tennessee Supreme Court.

During the pendency of the appeal in the Tennessee Supreme Court, the election of November 2, 1977 was held and appellant was elected as a delegate to the 1977 limited constitutional convention from the 29th House District of Hamilton County by the following vote: Paul A. McDaniel—4,570; Selma Cash Paty—2,944; Samuel Lee Doney—900; Ralph W. Timberlake —743.

On March 7, 1977 the Tennessee Supreme Court entered a decree and opinion reversing the judgment of the Chancery Court of Hamilton County and directing that an order be issued by the clerk of the Tennessee Supreme Court certifying to the Governor, the Secretary of State and the legislative body of Hamilton County that a vacancy for the position of delegate to the 1977 limited constitutional convention exists in the 29th House District, Hamilton County, by virtue of Reverend Paul A. McDaniel's ineligibility and adjudging costs against Reverend Paul A. McDaniel. On March 16, 1977 appellant filed a notice of appeal to this Court from the final judgment of the Tennessee Supreme Court.

Appellant applied for a stay of the Tennessee Supreme Court's decree of March 7, 1977 to Mr. Justice Stewart which was denied March 17, 1977 because no previous application had been made to the Supreme Court of Tennessee. On March 28, 1977 appellant filed an application for a stay from the Tennessee Supreme Court which on April 21, 1977 was granted for a period of 90 days from and after March 16, 1977. On June 20, 1977, the United States Supreme Court noted probable jurisdiction of this case. On June 21 appellant filed in the Tennessee Supreme Court an application for a stay pending disposition of this case in the Supreme Court of the United States. On June 28, 1977 the Tennessee Supreme Court denied appellant's application for a stay. Appellant then applied for a stay of the Tennessee Supreme Court's decree of March 16, 1977 to Mr. Justice Stewart which was granted July 6, 1977.

ARGUMENT

I

Appellant has developed the constitutional claims to be presented in this case and has criticized the opinion and holding of the Tennessee Supreme Court at some length in the Jurisdictional Statement. Since it would serve no useful purpose to repeat the arguments made in appellant's Jurisdictional Statement here, appellant would like to incorporate those arguments by reference. In this brief, appellant will respond to whatever arguments may have been raised in the opinion and holding of the Tennessee Supreme Court and in appellees' motions to dismiss which were not addressed in appellant's Jurisdictional Statement. Secondly, appellant will present an historical argument relating the history of clergy disqualification from civil office in England and the United States for the purpose of establishing that whatever legitimate interests may have once supported these clauses no longer exist.

Counsel for Appellee Paty argues that a ministerial classification is not invidious since it is used in other contexts under state and federal law. Motion of Appellee Paty to Dismiss at 12-13. Appellant has not suggested that a ministerial classification is impermissible for all purposes. There are constitutionally significant distinctions between a clergy disqualification clause and a draft exemption or tax preference. The most important distinction is that the clergy disqualification clause is a punitive one which penalizes free exercise of religion, whereas the purpose of the draft exemption is to enhance free exercise of religion in the United States—to "guard against a flock being without its shepard." *Fitts v. United States*, 334 F.2d 416 at 421 (5th Cir. 1964). *See also United States v. Bittinger*, 422 F.2d 1032 (4th Cir. 1969). Exclusion of the rental value of parsonages from gross income can be justified upon the secular ground

that the value of shelter in which the taxpayer is required to live as a condition of his employment should not be treated as income. *Cf. Waltz v. Tax Commission*, 397 U.S. 664, at 687 (1970) (Brennan, J. concurring). Secondly, the exclusion of the rental value of parsonages from gross income avoids precisely the same kind of entanglement problems the Court wishes to avoid in *Waltz v. Tax Commission, supra* at 674. Thirdly, the exclusion of the rental value of the parsonage enhances the free exercise of religion by in much the same way as the draft exemption approved by the Fifth Circuit in *Fitts*—it enhances the accessibility of the clergy to their parishoners.

The claim of the attorney general of Tennessee that "there is no evidence that any one group of voters would prefer the candidacy of a clergyman," Tenn. A.G., Motion to Dismiss 22, appears questionable in view of the substantial margin by which appellant won election. Juris. Statement 5. The remaining arguments made by the Attorney General in his motion to dismiss appear to be fully joined by appellant's arguments in the jurisdictional statement.

The Tennessee Supreme Court overruled appellant's assignments of error made to the chancellor's dismissal of the amended complaint and class action on behalf of voters and candidates in future legislative and constitutional convention elections. *Paty v. McDaniel*, 547 S.W. 2d 897 at 909-10 (Tenn. 1977).

The Tennessee Supreme Court relied exclusively upon the authority of *Story v. Walker*, 218 Tenn. 605, 404 S.W. 2d 803 (1966). *Story* is distinguishable from the present case on at least two grounds. First, appellant's amended complaint, styled as a "counter complaint, cross complaint and third party complaint" was properly certified on October 22, 1976, as a class action by the Chancellor. Juris. Statement A.62-63. *Cf. Sosna v. Iowa*, 419 U.S. 393 (1975). In contrast, *Story* was decided before the Tennessee Rules of Civil Procedure permitting class

actions under Rule 23 were adopted. The Tennessee General Assembly has declared that all laws in conflict with the Tennessee Rules of Civil Procedure "shall be of no further force or effect." TENN. CODE ANN. § 16-116. The Tennessee Rules of Civil Procedure were patterned on the federal rules and Tennessee courts are "influenced by the [federal] case law dealing with . . . issues in the construction and interpretation of our [state] rules." *Hixon v. Stickley*, 493 S.W. 2d 471 (Tenn. 1973). Appellant contends that the Tennessee court refused in this case to accord appellant's class action the ordinary weight it would be accorded under state law because of the federal character of appellant's claims. Discrimination by state courts against litigants asserting federal claims in state courts raises questions of federal law and permits federal review of what would otherwise afford an adequate and independent state ground of decision. *See Testa v. Katt*, 330 U.S. 386 (1947).

The Tennessee Supreme Court's novel extension of the state ripeness doctrine in *Paty v. McDaniel*, 547 S.W. 2d 897 (Tenn. 1977), reinforces appellant's claim that the state courts refused to accord the class action certification the weight it would generally be accorded under state law. The claim in *Story* was "abstract, theoretical or based on a contingency which may or may not arise" because unless or until Johnson City, Tennessee amended its zoning ordinance permitting non-residential use of the servient estate subject to the restrictive covenant limiting land use for residential purposes, there would be no need to determine the applicability or validity of the restrictive covenant for which appellant in *Story* had sought enforcement by his action for declaratory judgment. The question presented in *Story* was demonstrably abstract and would become ripe only upon a change of law. In contrast, no change of law is required in the instant case to bar Rev. McDaniel and others within his properly certified class from seeking legislative office in Tennessee or voting for candidates for legislative office. The question is, therefore, live and should be resolved.

Important policy considerations support this Court's determining the validity of TENN. CONST. art. IX, sec. 1 as well as the validity of 1976 TENN. PUB. ACTS, c. 848, sec. 4. First this Court has recognized the special difficulties posed by election cases through its relaxation of the mootness doctrine in the "capable of repetition, yet evading review" line of authority. *See*, for example, *Dunn v. Blumstein*, 405 U.S. 331 (1972). The policy considerations supporting a relaxation of the mootness doctrine in *Dunn* appear to apply with equal force to the question of ripeness presented here. Secondly, for the Court to refuse to entertain the validity of TENN. CONST. art. IX, sec. 1 on the ground that *Story* affords an adequate independent ground for decision precluding federal review would simply invite additional litigation should this Court solely invalidate 1976 TENN. PUB. ACTS, c. 848, sec. 4, excluding clergy from the 1977 Tennessee constitutional convention. The mootness problem may prove an insuperable barrier to the vindication of clergy refused ballot status in future Tennessee legislative races. It should be remembered that the unfavorable disposition of appellant's claims by the Tennessee Supreme Court may have defeated Rev. McDaniel's effort to serve as a delegate, but for a fortuitous event—namely, that in this case the chancellor declared that Rev. McDaniel's name should be placed on the ballot. Neither Rev. McDaniel nor other clergy interested in seeking legislative office in future elections can be assured of the favorable trial disposition appellant was granted here. The danger exists should this Court refuse to entertain the question of the validity of TENN. CONST. art. IX, sec. 1 in this case that a future election will be held in which clergy are denied ballot status in a legislative race and no final judgment can be obtained until after the election. Should the courts ultimately vindicate the claimed constitutional rights, they would be faced with the equally distasteful alternatives of disrupting the state electoral process through ordering a new election or failing to afford meaningful relief to a litigant with an approved federal claim. Thirdly, the merits of the question appear to be squarely

presented in this case and there appears to be no good reason to avoid the question. To decline to reach the validity of TENN. CONST. art. IX, sec. 1 would be a disservice to the important state and federal interest of affording an efficient, economical means of resolving disputes. It would appear wasteful of the resources of future clerical candidates for legislative office as well as the time of courts and lawyers to require additional litigation of this question. State economic interests would appear to favor the Court's considering the validity of TENN. CONST. art. 14, sec. 1 since attorney fees are generally awarded to the prevailing party under 42 U.S.C. § 1973*l* (e). Significantly, no important federalism values stand in the way of the constitutional validity of TENN. CONST. art. IX, sec. 1. Appellant here has taken the route preferred of late by some members of this Court. *See*, for example, *Wisconsin v. Constantineau*, 400 U.S. 433, at 439-40 (1970) (Burger, C.J.), joined by Blackmun, J., *dissenting*, *id.* at 443-44 (Black, J., joined Blackmun, J., *dissenting*). Appellant's federal claims have been presented initially to the state courts which have been given every opportunity of vindicating appellant's federal claims. Appellant's claim is a federal one arising under 42 U.S.C. § 1983. The predominant interests which underlie state procedural policies concerning the scope of class actions in the state courts and the application of state ripeness doctrine in this case are federal and call for correspondingly less deference to state interests in procedural uniformity. *See Dice v. Akron, Canton and Youngstown RR*, 342 U.S. 359 (1952). *Dice* considerations should apply with special force where, as here, the application of state class action and ripeness policies applied to defeat appellant's federal claims are novel, discriminatory and do not appear to be warranted in state law. There is no justification in the policies which underlie our federalism or in common sense for this Court to decline to reach the merits of TENN. CONST. art. IX, sec. 1.

The Tennessee Supreme Court adjudged costs against Rev. McDaniel. Appellant urges that, should he prevail in this litigation, this case be remanded with the direction that costs, including reasonable attorney's fees, be awarded appellant. Federal law specifically authorizes an award of attorneys fees to the prevailing party in actions such as this one under the Voting Rights Act of 1975, §14(3), 42 U.S.C. § 1973*l*(e). Assuredly, the clergy disqualification clause appellant challenges "operates impermissibly to dilute the voting strength of an identifiable element of the voting population." *Dallas County v. Reese*, 421 U.S. 477, 488 (1975); *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). *See also Lytle v. Election Comm.*, 541 F.2d 421 (4th Cir. 1976).

II

A Brief History of the Disqualification of Clergy From Civil Office in the United States and England.

The Tennessee constitutional convention of 1796, in disqualifying ministers from legislative office, did not write upon a clean slate. In fact, the roots of the Tennessee Constitution, Article IX, Section 1, lie deeply embedded in English history. A complete understanding of the purpose and effect of Tennessee's clergy disqualification clause is impossible without reference to English history and to the practice in other states before and after the American Revolution. Research by counsel has led to the discovery of a far more substantial history relating to the disqualification of ministers from legislative office than was heretofore suspected. With the exception of A. STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 622-28 (1950) and E. Swen, "The Disqualification of Ministers in State Constitutions," 26 WM. AND MARY HIST. Q. MAG. 69 (1917) and F. Swancara, "The Surviving Religious Test," 18 St. Louis L. Rev. 105 (1933), very little scholarly attention appears to have been devoted to this topic. The paucity of the legislative history from the 1796 Tennessee constitutional convention originally

adopting the challenged disqualification reinforces the need to look beyond the convention itself to establish the purpose of the disqualification.

The Tennessee disqualification of ministers from legislative office was not unique. Eight states adopted minister disqualification clauses in their state constitutions prior to Tennessee: N.C. CONST., art. XXXI (1776);[1] VA. CONST. (1776);[2] MD. CONST., art. 37 (1776);[3] DEL. CONST., art. 29 (1776);[4] GA.

[1] N.C.CONST., art. 31 (1776) provides:
that no clergyman, or preacher of the gospel, of any denomination, shall be capable of being a member of either the Senate, House of Commons, or Council of State, while he continues in the exercise of the pastoral function.

This provision was omitted from N.C. CONST. (1868).

[2] VA. CONST. (1776) provides:

[A]ll ministers of the gospel, of every denomination, be incapable of being elected members of either House of Assembly or the Privy Council.

This provision was continued in VA. CONST., art III, sec. 7 (1830) and VA. CONST., art. IV, sec. 7 (1850) and VA. CONST., art. IV, sec. 7 (1864); but omitted in VA. CONST. (1870).

[3] MD. CONST. art. 37 (1776) provides:

[N]o person, holding a place of profit or receiving any part of the profits thereof, or receiving the profits arising on any agency, for the supply of clothing or provisions for the Army or Navy, or holding any office under the United States, or any of them—or a minister or preacher of the gospel, of any denomination—shall have a seat in the General Assembly, or Council of State.

This provision was continued in MD. CONST., art. III, sec. 11 (1950) and was omitted in MD. CONST. (1864). However, the provision was readopted in MD. CONST., art. III, sec. 11 (1867).

[4] DEL. CONST., art 29 (1776) provides:

[N]o clergyman or preacher of the gospel, of any denomination, shall be capable of holding any civil office in this state, or of being a member of either of the branches of the legislature, while they continue in the exercise of the pastoral function.

This provision was continued in DEL. CONST., art. 8, sec. 9 (1792) and DEL. CONST., art. 7, sec. 8 (1831); but was omitted in DEL. CONST. (1897).

CONST., art. LXII (1777);[5] N.Y. CONST., art. XXXIX (1777);[6] S.C. CONST., art. XXI (1778);[7] KY. CONST., art. II, sec. 26 (1792).[8] In addition, five other states adopted minister disqualification clauses subsequent to Tennessee: LA. CONST., art.

[5] GA. CONST., art. LXII (1776) provides:

No clergyman of any denomination shall be allowed a seat in the legislature.

This provision was continued in GA. CONST., art. I, sec. 18 (1789), but omitted in GA. CONST. (1798).

[6] N.Y. CONST., art. 39 (1777) provides:

And whereas the ministers of the gospel are, by their profession, dedicated to the service of God and the care of souls, and ought not to be diverted from their great duties of their function; therefore, no minister of the gospel, or priest of any denomination whatsoever, shall at any time hereafter, under any pretense or description whatever, be eligible to, or capable of holding, any civil or military office or place within this state.

This provision was continued in N.Y. CONST., art VII, sec. 4 (1821) and was dropped from N.Y. CONST. (1846) and did not appeal in subsequent New York constitutions.

[7] S.C. CONST., art XXI (1778) provides:

Whereas the ministers of the gospel are by their profession dedicated to the service of God and the cure of souls, and ought not to be diverted from the great duties of their function, therefore no minister of the gospel or public preacher of any religious persuasion, while he continues in the exercise of his pastoral function, and for two years after, shall be eligible either as governor, lieutenant governor, a member of the senate, house of representatives, or privy council in this State.

This provision was continued in S.C. CONST., art. 1, sec. 23 (1790) and S.C. CONST., art. 1, sec. 30 (1865), but omitted in S.C. CONST. (1868).

[8] KY. CONST., art. I, sec. 24 (1792) provides:

No minister of religious society, member of Congress, or other person holding any office of profit under the United States or this commonwealth, except attorneys at law, justices of the peace, and militia officers, and coroners, shall be a member of either house during his continuance to act as a minister, in Congress, or in office.

This provision was continued in KY. CONST., art. II, sec. 26 (assembly), art. IV, sec. 6 (governor); KY. CONST., art. II, sec. 27 (assembly), art. III, sec. 6 (governor) (1850); but omitted from KY. CONST. (1890).

2, sec. 22 (1812);[9] Miss. Const., art. VI, sec. 7 (1817);[10] Mo. Const., art. 3, sec. 13 (1820);[11] Fla. Const., art. VI, sec. 10 (1838);[12] Texas Const., art. III, sec. 27 (1845).[13] Twelve of the fourteen states adopting clauses disqualifying ministers repealed or deleted these clauses from their state con-

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[9] La. Const., art. II, sec. 22 (1812) provides:

> No person while he continues to exercise the functions of a clergyman, priest or teacher of any religious persuasion, society or sect, shall be eligible to the general assembly, or to any office of profit or trust under this state.

A similar provision was contained in La. Const., art. III, sec. 6 (governor); both provisions were continued in La. Const., Title 2, art. 29 (1845) (assembly); La. Const., Title 3, art. 42 (governor); but were omitted from La. Const. (1852); however, both were continued in La. Const., Title III, art. 36 (1864) (assembly); La. Const., Title IV, art. 46 (governor), but were omitted from La. Const. (1868).

[10] Miss. Const., art. 6, sec. 7 (1817) provides:

> Ministers of the gospel being, by their profession, dedicated to God and the care of souls, ought not to be diverted from the great duties of their functions; therefore no minister of the gospel, or priest of any denomination whatever, shall be eligible to the office of governor, lieutenant-governor, or to a seat in either branch of the general assembly.

This provision was omitted from Miss. Const. (1832).

[11] Mo. Const., art. III, sec. 13 provides:

> No person while he continues to exercise the functions of a bishop, priest, clergyman, or teacher of any religious persuasion, denomination, society, or sect whatsoever, shall be eligible to either house of the general assembly; nor shall he be appointed to any office of profit within the state, the office of justice of the peace excepted.

This provision was omitted from Mo. Const. (1865).

[12] Fla. Const., art. VI, sec. 10 (1838) provides:

> No minister of the gospel shall be eligible to the office of governor, senator, or member of the house of representatives of the state.

This provision was omitted from Fla. Const. (1865).

[13] Republic of Tex. Const., art. v, sec. 1 (1836) provides:

> Ministers of the gospel being, by their profession, dedicated to God and the care of souls, ought not to be diverted from the great duties of their functions; therefore, no minister of the gospel or priest of any denomination whatever, shall be eligible to the office of the executive of the republic, nor to a seat in either branch of the congress of the same.

This provision was continued in the state's first constitution in Tex. Const., art. III, sec. 27 (1845) and Tex. Const., art. III, sec. 27 (1886); but omitted from Tex. Const. (1868).

stitutions. The Maryland clause was invalidated in *Kirkley v. State of Md.*, 381 F. Supp. 327 (D. Md. 1974). Tennessee, alone among the fifty states, has retained a constitutional clause disqualifying ministers from legislative office.

1. English common law origins of clergy disqualification for civil office: practices and usages of the house of commons.

The purpose of the Tennessee constitutional provision disqualifying ministers from legislative office arises from sentiments which were commonly held in this country and in England in the late eighteenth and early nineteenth centuries. The provenance and true meaning of the minister disqualification clauses adopted by Tennessee and other American states reach deep into English history.

The minister disqualification clauses in the constitutions of Tennessee and other states can be traced to the English practice excluding clergy from the house of commons. The Tennessee Supreme Court acknowledged that the Tennessee clergy disqualification clause was derived from the constitutions of North Carolina and the lost state of Franklin. *Paty v. McDaniel*, 547 S.W. 2d 987, at 907 (1977). The North Carolina clergy disqualification clause, as well as similar clauses in other early state constitutions, could be considered declaratory of prevailing pre-revolutionary colonial and English practice.

Blackstone in his *Commentaries* said that the clergy were not qualified "to be *elected* members of the house of commons

. . . for they sit in the convocation."[14] As authority for his conclusion, Blackstone relied upon the "law and custom of parliament, declared by the house of commons" and made reference to three instances in which clergy had been excluded from the house of commons. The three examples cited by Blackstone involved the exclusions of Alexander Newell, prebendary in Westminister in 1553; John Robson, a minister returned for Morpeth in Northumberland in 1620 and Dr. James Craddock from the borough of Richmond in 1661.

With reference to the exclusion of Alexander Newell, the Commons Journal for October 13, 1553 states:

> It is declared by the Commissioners, that Alex. Newell, being Prebendary in Westminster, and thereby having voice in the Convocation House, cannot be a Member of this House; and so agreed by the House; and the Queen's Writ to be directed for another Burgess in that place. 1 H.C. JOUR. 27 (1553).

On February 8, 1620, John Robson was excluded from commons. The house of commons journal for that date states:

> Sir Geor. Moore proceedeth with this Report for the third Question, concerning the Return of . . . a Minister, returned for Morpeth in Northumberland.
>
> Sir Edw. Coke:—When he Speaker, one put out: And that he saw Alexander Nowell (though he had not *curam animarum*) put out, because of the Convocation-house.

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[14] W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 174 (Sharswood ed. 1860) (Book 1 at 175 in original). Blackstone's lectures, originally delivered in 1753, had an enormous influence on late eighteenth century American political leaders, especially lawyers. *See, e.g.*, W. Holdsworth, *Aspects of Blackstone and his Commentaries*, 4 CAMP. L.J. 261 (1932). Sixteen of the original subscribers to the first American edition of BLACKSTONE'S COMMENTARIES afterwards became signers of the Declaration of Independence and six were members of the Constitution Convention. D. LOCKMILLER, SIR WILLIAM BLACKSTONE 170 (1938).

> Upon Question, Resolved, His Return void; and a new Writ to issue, for a new Election. 1 H.C. JOUR. 513 (1620).

Commons opposed the return of Robson, a "Clerk," because he "had or might have a Voice in the Convocation-house; [and] therefore [was] not fit to be admitted here". 1 H.C. JOUR. 511 (1620). Mr. Hackwyll agreed that the reason clergy were ineligible to serve in commons was that they have "a Voice [in] or attendeth . . . the Convocation". 1 H.C. JOUR. 512 (1620).

Another reason for excluding clergy from commons was that as "lords spiritual" they were represented in the house of lords. Thus, in the debates on the exclusion of Robson, Sir. H. Poole remarked that there was "[n]o Englishman, but to be either of the Upper or Lower House." 1 H.C. JOUR. 512 (1620).

In the debates on the exclusion of Robson, Sir Edward Coke offered a third reason for the exclusion of clergy from commons. Trial in England must be "*per pares*"—by one's peers. 1 H.C. JOUR. 512 (1620). Trial of the nobility must be by the nobility and the trial of dukes by dukes. Coke noted that one must be "[e]ither of the Upper or Lower House, except some few cases". He admitted that knights were not to be tried by knights. According to Coke, a "Banerette cannot serve here, in respect of the Honor he hath at Funerals . . ."

Coke's trial-by-peers argument for the exclusion of clergy was consistent with prevailing Engish constitutional theory in the sixteenth century. *See*, for example, T. SMITH, DE REPUBLICA ANGLORUM (L. Alston ed., 1906). The "most striking feature of Smith's book was that it regarded the constitution as consisting mainly of the courts and represented parliament itself as the highest court in the kingdom." G SABINE, A HISTORY OF POLITICAL THEORY 449 (1960).

A third clergyman, Dr. James Craddock, was excluded from commons in 1621. The commons journal for that date states:

Serjeant Charleton reports, from the Committee of Privileges and Elections, touching the Election for the Borough of Richmond in the County of Yorke, That it appeared to them, that Dr. Craddock was in Holy Orders; and that Mr. Wandesford had the majority of Voices present at the Election: And the Opinion of the Committee, That Dr. Craddock was uncapable of being elected a Burgess for the Borough; and that Mr. Wandesford was duly elected, and ought to sit as Burgess for the said Borough of Richmond.

Resolved, That this House doth agree with the Committee, That Dr. Craddock was a person uncapable to be elected, and his election void: And that Mr. Wandesford was duly elected a Burgess for the said Borough of Richmond, and ought to sit in this House: And that the Clerk of the Crown, or his Deputy, do attend this House with the Return; and do erase out the name of Dr. Craddock, and insert the name of Mr. Wandesford.

Which was, the next day, done at the Clerk's Table. 8 H.C. JOUR. 346 (1621).

Additional extracts from the journals of commons pertinent to the eligibility of clergy to sit in commons were collected by a select committee in 1801 "appointed to examine the journals of this House and Records of Parliament, for Precedents respecting the Eligibility of Persons in Holy Orders." COMMITTEE ON THE ELIGIBILITY OF PERSONS IN HOLY ORDERS, H.C. REPORT 150 (1801) (microfilm) (hereinafter cited Commons Report of 1801). (A typewritten summary of the portions of the Commons Report of 1801 which are written in Norman French and medieval Latin have been lodged with the Court and provided to opposing counsel.) The Commons Report of 1801 was occasioned by the election of Rev. John Horne Tooke, an ordained priest of the Established Church, and led to the enactment of a statute, declaratory of English law, excluding from commons ordained priests, deacons or ministers

The Clergy Disqualification Act, 41 GEO. III, c. 63 (1801). This statute has subsequently been construed to apply to all who have "received episcopal ordination." *In re Macmanaway* [1951], A.C. 161, at 178 (P.C.). The Commons Report of 1801 made reference to several additional extracts from the journals indicating the ineligibility of clergy to sit in commons. Commons Report of 1801, at III, §3, *See* 1 H.C. JOUR. 989 (1604) (remarks of Mr. Tate and Sir George Moore); 1 H.C. JOUR. 459 (1604). (remarks of Richard Williamson, Mr. Whitlock and Mr. Finch).

The Commons Report of 1801 also included a reference to the case of Mr. Edward Rushworth who was made a deacon in 1780 and was returned to commons in 1784. Nonetheless, Mr. Rushworth was declared to have been "duly elected." 40 H.C. JOUR. 31-32, 241-42, 463, 551, 561 (1784). Counsel for Mr. Rushworth had "rested the strength of his case on the supposed distinction between the office of a priest and a deacon." 35 PARL. HIST. ENG. 1323 at 1365 (1801) (remarks of Earl Temple). *But see* VA. H. JOUR., Jan. 8, 1830 (microfilm) in which a Methodist deacon, Mr. Humphrey Billups, was excluded from legislative office in Virginia on the ground that *deacons* fell within the "spirit" of the clause in Virginia's constitution disqualifying *ministers* from legislative office.

The committee preparing the Commons Report of 1801 made a search "into all the Returns to Writs issued for the election of members to serve in Parliament, from the earliest period in which they are extant." 14 H.C. REP. 150 (1801) (microfilm). The report at part III listed sixty-two persons who had been returned to commons between 34 Edward I (1306) and 14 George II (1741) who "could furnish any presumption of [being] individuals in Holy Orders." *Ibid*. Each of these persons appear to have a religious or a university title such as "clericus", "doctor of laws", "doctor of civil laws", "master of laws", "dean", "Chancellor to the Right Reverend

Father in God the Lord Archbishop of Canterburys Grace", and "Doctor of Laws, Master of the Court of Requests". The committee stated that it was "fully aware that many of them are well known to be civilians only." *Ibid.* The committee also asserted that at least one member of commons returned with the religious title of Dean, Christopher Parkins, had been granted the benefice of the Queen along with a dispensation recognizing that he had not been admitted in "any sacred or other Orders." *Ibid.*

In the middle ages, the terms, "Clerc", "Clercq" and "Clericus" were ambiguous. *See* A. J. GREIMAS, DICTIONNAIRE DE L'ANCIEN FRANCAIS 118 (Larousse, 1968), which indicates that the old French word, "Clerc", had three separate meanings, namely: (1) Student, (2) Cleric as opposed to layman and (3) Learned person. *See also* 35 PARL. HIST. ENG. 1362 (1801) (remarks of Earl Temple).

The Commons Report of 1801 also included the case of Sir Thomas Haxley along with the names of individuals in holy orders who may have been returned as members of the house of commons but reported that "no such name occurs amongst [the returns]." *Ibid.* It would appear that Sir Thomas Haxley, although admittedly a cleric, was not a member of commons but had only written a letter to commons suggesting that the king's household expenses were too extravagant and should be diminished. *See* Commons Report of 1801, at 159-60 (translated summary lodged with Court).

It is unclear whether clerics ever sat in commons. One historian has suggested:

> Anciently, all the free men of England, or at least those that held of the crown in chief, came to parliament: and then the inferior clergy had writs as well as the superior; and the first of the three estates of the kingdom were the bishops, the other prelates, and the inferior clergy. But when the

> parliament was divided into two houses, then the clergy made likewise a body of their own, and sat in convocation, which was the third estate. But the bishops having a double capacity, the one of ecclesiastical prelature, the other of being the king's barons, they had a right to sit with the lords as a part of their estate, as well as in the convocation. And though, by parity of reason, it might seem that the rest of the clergy, being freeholders as well as clerks, had an equal right to choose or be chosen into the house of commons; yet, whether they were ever in possession of it, or whether, according to the clause *praemonentes* in the bishops' writ, they were ever a part of the house of commons, is a just doubt. G. BURNET, 2 HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND 97-98 (1829) (hereinafter BURNET'S HISTORY).

Although the question of whether the lower clergy ever sat with commons is clouded by doubt, *see* 2 BURNET'S HISTORY 96-102, it is apparent that this right had been lost as early as the mid-sixteenth century, since during that period the clergy of the lower house of the convocation twice petitioned the Archbishop of Cantebury that they be permitted to sit in commons. The first petition urged:

> . . . that according to the ancient custom of this realm, and the tenour of the king's writ for the summoning of the parliament, which be now, and ever have been, directed to the bishops of every diocess, the clergy of the lower house of the convocation may be adjoined, and associate with the lower house of the parliament; or else, That all such statutes and ordinances as shall be made concerning all matters of religion and causes ecclesiastical, may not pass without the sight and assent of the said clergy. G. BURNET, 2 HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND: A COLLECTION OF RECORDS AND ORIGINAL PAPERS, Pt.

II, Nos. 16-17 at 171-72 (1829) (hereinafter BURNET'S RECORDS).

The second petition acknowledged the convocations could only be "assembled by the king's writ", that canons were subject to "the king's most royal assent" and that no canons would be executed which were "repugnant to the king's prerogative royal, or the customs, laws, or statutes of this realm." *Id.* at 172. These acknowledgements simply reflected the laws through which Henry VIII had established complete royal dominion over the Established Church to the excusion of the See of Rome. *See* 25 HENRY VIII, c. 19 (1533); 27 HENRY VIII, c. 25 (1535). It has been suggested that "from the acknowledgement by the clergy . . . of the kings supremacy, we may date the non-existence of the clergy as a separate and distinct estate of the kingdom." 35 PARL. HIST. ENG. 1357 (1801) (remarks of Earl Temple).

Burnet observed that "though this design of bringing the inferior clergy into the house of commons did not take at this time [viz., when the petitions were presented by the lower house of the convocation to the Archbishop of Cantebury] yet it was again set on foot in the end of Queen Elizabeth's reign, and reasons were offered to persuade her to set it forward; which not being then successful, these same reasons were again offered to King James, to induce him to endeavor it." 2 BURNET'S HISTORY 98.

The petition of the lower clergy to Queen Elizabeth and King James is reprinted at BURNET'S RECORDS 173 (No. 18). The petition recites that in "former times, when causes ecclesiastical were either not at all, or else very rarely treated of in that assembly commons], the clergy were thought men must meet to consult and determine of the civil affairs of this realm." *Id.* at par. 1. The petition reasoned that if church-matters were to be debated in commons, "how much more necessary it is now than

it was in former times, that some of the clergy be there present . . . *Id.* at par. 3. The petition explained the "causeless separation" of the clergy from commons: "the king being offended with some of them, did so grievously punish the whole body." *Id.* at par. 4. In the petition presented to King James, the fourth paragraph explained the clergy's exclusion from commons was occasioned by the "clergy falling into a premunire." *Id.* editor's note. The *praemunire* must have consisted in violations of the act of 16 RICH. II, c. 5 (1392). *See also* 25 HENRY VIII, c. 19. (1533). Burnet discounts the *praemunire* argument as being "not credible." *See* 2 BURNET'S HISTORY 98.

The petition included a strong equal protection argument with a distinctly modern appeal against the exclusion of clergy:

> Though the clergy and the universities be not the worst members of this commonwealth, yet in that respect they are of all other in worst condition; for in that assembly every shire hath their knights, and every incorporate town their burgesses, only the clergy and the universities are excluded. *Id.* at par. 6.

The petition also contains an argument from political legitimacy or due process which is as persuasive today as it was when uttered more than three hundred years ago:

> The wisdom and justice of this realm doth intend, that no subject should be bound to that law, whereunto he himself (after a sort) hath not yielded in his consent; and the clergy and the universities may now be concluded by law, without their consent, without their just defense, without their privity. *Id.* at par. 7.

The thirteenth paragraph of the petition may furnish an explanation for the parliamentary hostility to the clergy serving in commons during the seventeenth and eighteenth centuries: that the presence of clergy in commons would assure a number

> . . . in that assembly, that ever will be most ready to maintain her prerogative, and to enact whatsoever may make most for her highness safety and contentment, as the men that next under God's goodness do most depend upon her princely clemency and protection. *Id.* at par. 13.

The petition concluded with the intimation that were clergy admitted to commons, they might counterpoise the nobodys who have power to reduce the king's budget requests tenfold. *Id.* at par. 15. Plainly, the opposition to the seating of clergy in commons was based to a considerable extent on the apprehension that the clergy would "support the prerogative of the crown in contradistinction to the liberties of the people." 35 PARL. HIST. ENG. 1360-61 (1801) (remarks of Earl Temple). There was substantial basis in fact to support the apprehensions of commons leaders of the royal prerogative. The Tudor kings—the "real founders of despotic government in England"—

> . . . convoked Parliament irregularly and limited its sessions to brief periods; they interfered with elections and packed the two houses with their own favorites; and they cajoled, flattered or bullied the members as the case might require in order to obtain their support. E. BURNS and P. RALPH, 2 WORLD CIVILIZATIONS 5 (1954).

The record of the Stuarts was no better. *Id.* at 5-7.

Thus, it can be observed that one of the strongest governmental interests supporting the disqualification of clergy in England —apprehension of undue legislative influence of the crown— could never have been viable in any American state after the Revolution. In England, the king had vast power over the clergy of the Established Church. *See*, for example, 25 HENRY VIII, c. 19 (1533). The king's powers over the benefices of the clergy was a patronage power not unlike that of our Presidents or state governors over their political appointees. The argument against the seating of clergy in commons was often based on the need

for preserving the "purity" or "independence" of commons—essentially a conflict-of-interest argument. See, for example, 35 PARL. HIST. ENG. 1367, 1376 (1801) (remarks of Earl Temple and Chancellor Addington). With the repudiation of the monarchy in the American Revolution, one of the strongest policies supporting the disqualification of clergy—the need to protect against undue royal influence—ceased to have weight in any American state.

For twenty years, 1641-61, an act of parliament disqualified the clergy from the exercise of all temporal authority. The Act "Disenabling all Persons in Holy Orders to exercise any Temporal Jurisdiction or Authority", 16 CHARLES I, c. 27 (1641),[15]

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[15] Because the Act is not printed in Statutes at Large, it is reprinted below:

> Whereas Bpps and other Persons in Holie Orders ought not to be intangled wth secular Jurisdiccon (the Office of the Ministery being of such greate Importance that it will take upp the whole Man) and for that it is found by long experience that theire intermeddling wth secular Jurisdiccons hath occasioned great Mischiefes and Scandall both to Church and State His Matie out of His religious care of the Church and Soules of His People is gratiously pleased that it bee Enacted And by Authority of this present Parliam' bee it Enacted That noe Archbpp or Bishopp or other Person that now is or hereafter shall be in Holy Orders shall att anie time after the Fifteenth day of February in the yeare of our Lord one thousand six hundred fourty-one have anie Seate or Place Suffrage or Voice or use or execute anie Power or Authority in the Parliaments of this Realme nor shall bee of the Privy Councell of his Matie His Heires or Successors or Justice of the Peace of Oyer and Terminer or Gaole Delivery or execute anie Temporall Authority by virtue of anie Comission But shall bee wholy dishabled and be encapable to have received or execute anie of the said Offices Places Powers Authorities and Things aforesaid And bee it further Enacted by the Authority aforesaid That all Acts from and after the said fifteenth day of February wch shall be done or executed by anie Archbishopp or Bishopp or other Person whatsoever in Holy Orders and all and everie Suffrage or Voice given or delivered by them or anie of them contrarie to the Purport and true Meaning of this present Act shall be utterly void to all Intents Construccons and Purposes. 14 H.C. REP. 161 (1801) (microfilm).

was repealed during the second year of the Restoration. 13 CHARLES II, c. 2 (1661).

The preamble to the Clergy Disqualification Act of 1641 recited that it is "found by long experience that their [bishops and other persons in holy orders] intermedling with secular Jurisdictions hath occasioned great Michiefs and Scandall." 14 H.C. REP. 161 (1801) (microfilm). It has been suggested that if the clergy

> . . . never had sat there, how could the act have possibly stated that inconveniences had arisen from it? This act was repealed in 1661, and it was worthy of notice, that the preamble of the repealing statute recited that the act of 1641 had made several objectionable alterations in the laws and customs of parliament, a reasonable proof at this parliament, a reasonable proof at this distance of time that the act of 1641 had made several objectionable alterations in the laws and customs of parliament, a reasonable proof at this distance of time that the act in question had, amongst other things, invaded the constitution of parliament by declaring that persons in holy orders, were ineligible; and at all events, since their exclusion clearly originated with the act of 1641, which the latter statute repealed, it seemed impossib'e to maintain that they did not become eligible again, and no law since had been passed to declare them incapable of sitting in the House of Commons. 35 PARL. HIST. ENG. 1397 (1801) (remarks of Mr. Erskine).

The response to Mr. Erskine's argument is that the Act of 1641 "was made against the bishops though the clergy were included by name." 35 PARL. HIST. ENG. 1396 (1801) (remarks of the Attorney General). It has also been observed that Dr. Craddock was excluded "not under the general law, but under a particular statute, which was afterwards repealed." 35 PARL. HIST. ENG. 1398 (1801) (remarks of Mr. Erskine). In rebuttal, it has been pointed out that Dr. Craddock was not "declared ineligible

under the Act of 1641, for that act was repealed six months before his election was decided", 14 H. C. REP. 1398 (1801) (microfilm) (remarks of the Attorney General).

The similarities between the Clergy Disqualification Act of 1641 and the disqualification clauses adopted by Tennessee and other American states is apparent. The clergy disqualification act of 1641 went further than English practice subsequent to 1661 and further than the disqualification clauses of most American states. The 1641 English statute disqualifies clergy from the exercise of "Anie Temporall Authority". A similar disqualification appeared in the draft of the Tennessee Constitution presented January 30, 1796. JOUR. OF TENN. CONST. CONV. OF 1796, at 18. (Clergy ineligible for "any civil or military office or place of trust within the state"). On February 1, 1796 the proposed Tennessee clergy disqualification clause was amended to limit the disqualification of clergy to "either branch of the legislature." *Id.* at 23. This amendment was consistent with eighteenth century English practice since it was conceded that clergymen "had always been placed in all the commissions of the peace throughout England." 35 PARL. HIST. ENG. 1397-98 (1801) (remarks of Mr. Erskine).

The preamble of the Clergy Disqualification Act of 1641 also established a pattern followed by Tennessee and several other American states. The Act of 1641 attempted to justify the exclusion of the bishops and other persons in holy orders from the exercise of any temporal authority for three reasons: (1) That the Office of the Ministry is of such great importance that it will take up the whole man. (2) That it is found by long experience that the intermeddling of bishops and others in holy orders with secular jurisdiction has occasioned great mischief both to Church and state and (3) that the act is prompted by religious care for the Church and the souls of the people. In a similar vein, the preamble of the Tennessee clergy disqualification clause seeks to legitimate the disqualification because "Ministers of the Gospel

are by their profession, dedicated to God and the Care of Souls." *Accord*, J. LOCKE, 6 WORKS 172-73 [1692] (1823).

Can we say of these preambles: "The Lady doth protest too much, methinks." W. SHAKESPEARE, HAMLET, ACT III, Sc. 2, Line 242. Richard Marius, professor of history at the University of Tennessee, Knoxville and a specialist in the English history of the reformation and rennaissance has observed that the Clergy Disqualification Act of 1641 was

> . . . passed not against the lower clergy, but to get the bishops, who had enormous wealth and power, out of politics. It was done partly in pique against the king. The Act of 1641 was an anti episcopal and anti-royal statute enacted by Puritans. The king's allies were the bishops. The purpose was to put the king in his place by punishing his closest allies, the bishops. Prof. Richard Marius to Frederic S. Le Clercq, July 26, 1977.

The punitive provisions of the Act of 1641 may have been cloaked in language of great solicitude for the church to forestall the day when the bishops might observe the authors of the act at the scaffold. The most probable intention of the Act of 1641 was to stew the bishops in their own juice. Query whether or not the Tennessee clergy disqualification clause was a mock heroic, tongue-in-cheek veil for anti clericism? The *effect* of the Tennessee clergy disqualification clause is indisputably punitive, even if that were not its purpose. The clause compromises the fundamental voting rights and free exercise rights of the clergy so substantially that one can surely say of its framers—with such friends, the Tennessee clergy needs no enemies.

Alternatively, if one accepts the preamble to the Tennessee clergy disqualification clause, it must be conceded that the declared purpose of the statute is religious. A plausible argument

can also be made that the effect of the act of 1641 was to reinforce and support ecclesiastical law, the bishopric charge in the ordination of priests in the Established Church of England and the Holy Bible. The Act of 1641 had a religious effect because it reinforced Canon LXXVI of the ecclesiastical law adopted in 1604. Canon LXXVI provides

> Ministers at no time to forsake their calling. No man being admitted a Deacon or Minister, shall from thencefoorth voluntarily relinquish the same, nor afterward use himselfe in the course of his life, as a Layman, upon paine of Excommunication. And the names of al such men so forsaking their calling, the Church-wardens of the Parish where they dwell shall present to the Bishop of the Diocesse, or to the Ordinarie of the place, having Episcopall Jurisdiction. CONSTITUTIONS AND CANNONS ECCLESIASTICAL, LXXV (*sic.*) (1612) (microfilm) (*See also* 35 PARL. HIST. ENG. 1379 (1801) (remarks of Chancellor Addington).

Likewise, the Act of 1641 had a religious effect because it reinforced the liturgy of the Established Church of England. The bishop of the Established Church is directed in the ordination of priests to charge each priest thusly:

> *. . . to forsake and set aside, as much as they may all Worldly Cares and Studies. It is hoped that they have clearly determined by God's Grace, to give themselves wholly to this Vocation and as much as lieth in them to apply themselves wholly to this one thing, and to draw all their Cares and Studies this way, and to this end . . .* G. BURNET, A DISCOURSE OF THE PASTORAL CARE 116 (1692) (microfilm) (emphasis in original).

The priests of the Established Church must further promise upon ordination that they "*will be diligent in . . . laying aside the Study of the World and the Flesh. Id.* at 121 (emphasis in original).

Bishop Burnet observes that the laying aside of the study of the world and the flesh by ordained priests

> . . . carries on that great Notion of the *Pastoral Care*, which runs through this whole *Office*; that it is to be a Man's entire Business and is to possess both his thoughts and his time. *Ibid.* (Emphasis in original)

Thus, the clergy disqualification clauses in the Act of 1641 reinforced "The Vows and Promises Priests make before they can be Ordained." *Ibid.*

The Tennessee law has a religious effect strikingly similar to the Act of 1641. Whereas the Act of 1641 had the effect of reinforcing the canon law and the liturgy of the Established Church, the Tennessee clergy disqualification clause gave the force of law to the religious practices and teaching of the Presbyterians faith whose Scotch-Irish adherents dominated the 1796 Tennessee constitutional convention. *See*, WORKS OF JOHN KNOX 519 (D. Laing ed. 1966) and J. Henneman, "Recent Tennessee History of Tennesseans", 4 SEWANEE REV. 439 (1896).

Yet a third religious effect of the clergy disqualification clauses of the Act of 1641 and of the Tennessee constitution as well is that they reinforce scriptural authority. *See Acts* 6:2-4 which provides:

> And the twelve summoned the body of the disciples and said, "It is not right that we should give up preaching the word of God to serve tables. Therefore, brethern, pick out from among you seven men of good repute, full of the spirit and of wisdom, whom we may appoint to this duty. But we will devote ourselves to prayer and to the ministry of the word."

See also the twentieth chapter of *Matthew*.

The above quoted passage from *Acts* is often cited as the Biblical authority for the exclusion of clergy from civil office. *See*, for example, J. LOCKE, 6 WORKS 172 (1823).

It is illuminating to consider the clergy disqualification clauses from a rhetorical perspective. Robert W. Glenn, associate professor of speech at the University of Tennessee, Knoxville, has suggested that the preambles of the Act of 1641 and of the clergy disqualification clause in the Tennessee constitution are closely related to two classical rhetorical techniques: *benevolentia* and *concessio*. *Benevolentia* involves the defusing of an opponent's objections through praise. *Concessio* involves the defusing of an opponent's argument by conceding those aspects of the argument which are irrelevant, thus creating an image of fairness when, in fact, all points given away are non-germane. These argumentative forms

> . . . can be commonly found in discourse by spokesmen of entrenched powers who are trying to rationalize their opposition to the sharing of that power with those out of power. What better way to do that than to compliment those whom you oppose, to praise their virtues, to mention positively the contributions they are making in whatever service they are performing. Professor Robert Glenn to Frederic S. Le Clercq, July 26, 1977.

Professor Glenn has stated that the preamble of the Act of 1641 and the clergy disqualification clause of the Tennessee constitution use

> . . . God as the master symbol. If a rhetorician can successfully link or identify a master symbol with the cause that he is arguing, then the audience is obliged to accept the cause because to deny the cause is to deny the master symbol.
>
> If God established a relationship between man and woman or church and state, then to argue for a readjust-

ment of that relationship is to suggest that God was wrong or to deny God's plan. Prof. Robert W. Glenn to Frederic S. Le Clercq, July 26, 1977.

The use of authority symbols such as the God symbol in the preamble to the Tennessee clergy disqualification law has been explained by Gerth and Mills:

> Those in authority within institutions and social structures attempt to justify their rule by linking it, as if it were a necessary consequence, with moral symbols, sacred emblems, or legal formulae which are widely believed and deeply internalized. These central conceptions may refer to a god or gods, the 'votes of the majority,' the 'will of the people,' the 'aristocracy of talents or wealth,' to the 'divine right of kings,' or to the allegedly extraordinary endowment of the person of the ruler himself.
>
> Various thinkers have used different terms to refer to this phenomenon: Mosca's 'political formula' or 'great superstitutions,' Locke's 'principle of sovereignty,' Sorel's 'ruling myth,' Thurman Arnold's 'folklore,' Weber's 'legitimations,' Durkheim's 'collective representations,' Marx's 'dominant ideas,' Rousseau's 'general will,' Lasswell's 'symbols of authority,' or 'symbols of justification,' Mannheim's 'ideology,' Herbert Spencer's 'public sentiments'—all testify to the central place of master symbols in social analysis . . .
>
> H. GERTH AND C. MILLS, CHARACTER AND SOCIAL STRUCTURE: THE PSYCHOLOGY OF SOCIAL INSTITUTIONS 277 (1953).

Professor Glenn has observed that authority figures do not use the *concessio* or *benevolentia* argument against

> . . . all aspirants to power. It is much more common to find the powerless discredited as uneducated, mentally feeble, unprepared to share power—e.g., George Fitzhugh on slaves in the 1850's, Albert Beveridge on the Phllippinos in 1898, George Wallace on Southern blacks in the 1960's . . . The argument we were discussing is probably used when the powerless group is sufficiently large (women) or respected (clergy) that a general audience will not accept the discrediting strategy. So, if the aspiring group cannot be discredited, relegate them to a closely circumscribed realm of duties which are praised as of the highest value to society but which leave the essential power and property relations unaffected.
>
> Prof. Robert W. Glenn to Frederic S. Le Clercq, July 26, 1977.

Professor Michael Osborn of the Department of Speech at Memphis State University has suggested that the Act of 1641 and the Tennessee clergy disqualification clause alike involve an

> . . . abuse of hyperbole. The office of the clergyman is exaggerated in order to justify the conclusion that he should not be doing anything else. Prof. Michael Osborn to Frederic S. Le Clercq, July 26, 1977.

Sir Edward Coke wrote in his INSTITUTES that

> [n]one of the clergy, though he be of the lowest order, are eligible to be knight, citizen or burgess of parliament, because they are of another body, *viz.* of the convocation. 4 INSTITUTES OF THE LAWS OF ENGLAND 47 (1644)

Coke cited as authority "Alex Nowels case, who after was deane of Paul's being a prebend." *Ibid.* Thus, the two foremost and most widely read authorities on the English law in seventeenth (Coke) and eighteenth (Blackstone) centuries agreed that clergy could not sit in commons. The drafters of the clergy disqualification clauses of the early American state constitutions

doubtless relied in part upon the authority of Coke and Blackstone. Assuredly, members of commons supporting The Clergy Disqualification of 1801 relied very heavily upon the authority of Coke and Blackstone. *See*, for example, 35 PARL. HIST. ENG. 1366 (remarks of Earl Temple), 1375 (remarks of Chancellor Addington), 1400 (remarks of Mr. Gragge) (1801). Indeed, the eminence of Coke and Blackstone as commentators on the common law and the English constitution have given their works independent force in the shaping of the constitutions of England and America.

The English practice of excluding clergy from commons probably arose within the context of more general policies against dual office holding. The exclusion of clergy has been defended by reference to classical notions of symmetry: "That clergy are not eligible to parliament, nor laymen to Convocation." 35 PARL. HIST. ENG. 1366 (1801) (microfilm) (remarks of Earl Temple). It has also been asserted that to admit the clergy to commons would "create a class of men enjoying double privileges"—the privileges of convocation and of commons. *Id.* at 1367. One could not hold office both in the house of lords and commons. Coke observed that "[n]one of the judges of the kings bench, or common pleas, or barons of the exchequer that have judicial places can be chosen knight, citizen or burgess of parliament . . . because they be affiants in the lord's house . . ." *Ibid.* The writ summoning the Coventry Parliament of 6 Henry IV (1404) went so far as to exclude those holding the office of lawyer as a result of which it has ever after been styled the "lack-learning" parliament. *Ibid.* By special order of the house of commons, Coke reported that persons holding the office of attorney general were excluded from parliament. Thus, the exclusion of clergy can be seen as a special instance of the broader policy against dual office holding. In England, both civil and ecclesiastical offices were held through the crown and, in that context, a policy disqualifying individuals from holding two

public offices may have much to commend it. The implementation of a policy against dual office holding by means of a clergy disqualification clause is utterly devoid of rational basis in the United States where ecclesiastical offices are not bestowed by the crown or the state, as are the offices of the Established Church in England, but are rather completely private positions.

In the United States, a policy of disestablishment has been mandated by the Establishment Clause of the First Amendment. One can look with interest to the impact of non-establishment upon commons' clergy disqualification policy. Only the episcopally ordained clergy are excluded from commons. *See In re Macanaway* [1951], A.C. 161 (P.C.). Thus, in the English commons today, "all Non-conformist ministers and also clergy of the Disestablished Church in Wales may now sit." 3 STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND 355 (L. Warmington ed., 1950). *See* 28 HALSBURY'S LAWS OF ENGLAND, Pt. 3, sec. 2, par. 546 at 336 (1959) *and* 45 HALSBURY'S STATUTES OF ENGLAND 1601 at par. 10 (3) (1976). The English practice of permitting non-episcopal disestablished clergy to sit in commons is offered to this Court as persuasive authority for invalidating the clergy disqualification clause in the Tennessee constitution. Since our Establishment Clause guarantees that ecclesiastical offices shall be private, not public, the policy against dual office holding of public officers has no place as applied to clergy in the United States. The continuing English policy of disqualifying disestablished, episcopally ordained clergy from commons can be explained on grounds not applicable to the United States—namely, protection of the Established Church.

Both Coke and Blackstone reasoned that clergy could not sit in commons because they sat in convocation. The convocation in England was a "miniature of parliament". W. BLACKSTONE, COMMENTARIES, chap. 7, par. V at 279 (1860). Convocations originally were part of the Parliament of England so

that canons passed by convocations on ecclesiastical matters within the assent of the king bound the whole realm. *See Bird v. Smith*, Moore 781, 72 Eng. Rep. 903 (K.B. 1606) (a translation of this opinion from Norman French has been lodged with the Court and provided to opposing counsel), *overruled*, *Middleton v. Croft*, 2 Str. 1056, 93 Eng. Rep. 1030 (K.B. 1737). It has been observed subsequently from the Queen's Bench that the "historical reasons [for *Bird*] remain true as history and indeed cannot be denied." *Queen v. Archbishop of York*, 20 Law Rep. 744 (Q.B. 1888). Thus, for the purposes of legal history, it can be established that prior to 1736 the prevailing view in England was that

> . . . the Canons of the Church made by the convocation and the King without Parliament will bind in all matters ecclesiastical as well as by Act of Parliament, because they say that by Common Law each bishop in his diocese, archbishop in his province and convocation, house in the nation can make canons to bind in their limits and for this reason the convocation of the clergy was a form of the Parliament of this realm, but each brought his peculiar function with him into the convocation house. And a clergyman cannot now be of the Parliament House of Commons nor a temporal man be of the Convocation of the Clergy, as Coke cites, that it was resolved by both houses in conference together in the year 21 Hen. 8 so that when the Convocation makes canons on things belonging to them, and the king confirms them, they will bind the entire realm. *Bird v. Smith, supra* (translation).

Convocation is

> . . . [p]robably in some shape older than Parliament; certainly at the time of Edward I and Edward II there were attempts made, partially and temporarily successful, to incorporate it into Parliment. *Queen v. Archbishop of York*, 20 Law Rep. 744, 746 (QB 1888).

The summons of the Clergy to Parliament included in Part I of the Commons Report of 1801, 14 H.C. Rep. 150 (1801) (microfilm), (*see* lodging of translated summary) reinforce the consultative role of the English clergy through convocation. However, the "separation of Convocation and Parliament has been complete since the days of Richard II, if not Edward III." *Queen v. Archbishop York*, 20 Law Rep. 744, 746 (1888). As early as 15 Edward III (1341) the rolls of Parliament related that "men of the Holy Church who hold nothing by barony and who are not accustomed to sit in Parliament, will pay the tithe." 14 H.C. Rep. 154 at col. 2, sec. 32 (1801) (translation).

In Convocation, the clergy

> . . . not only passed canons with the King's consent, but taxed themselves, which like many a right once earnestly contended for as a privilege, became in lapse of years a burden, and was finally extinguished about 1665 in consequence of a verbal and wholly informal agreement between Archbishop Sheldon and Lord Clarendon who was at that time Lord Chancellor. *Queen v. Archbishop of York*, 20 Law Rep. 744, 746 (1888).

Thus, it can be seen that unlike the lords spiritual who have always sat conjointly with lords temporal in the house of lords, the lower clergy were separated from commons perhaps as early as the mid-fourteenth century. The representation of lower ecclesiastical offices in the Convocation with its powers to tax and to promulgate canon law became established as a ground for the exclusion of those eligible for its offices from commons. As the power of Convocation diminished or shifted to commons, the English clergy responded with the petitions submitted to Queen Elizabeth and James I.

There is not now, nor has there ever been in the United States, any counterpart of the convocation in England. Dele-

gation of the powers of governance to ecclesiastical authority is incompatible with the Establishment Clause of the First Amendment. Yet, historically, the principal reason for the disqualification of the English clergy from commons was grounded in their right to participate in convocation. It is perhaps an ironic commentary on the vital role imitation assumes at constitutional conventions that as many as fourteen of the United States in their early state constitutions adopted clergy disqualification clauses the principal historical justification of which had begun to lose its vitality almost 100 years before the American Revolution.

The clergy disqualification clauses in the early American state constitutions doubtless reflected also the legitimate concern of the newly independent states that no church occupy the "adulterous" relationship with the state that the Established Church had in England. T. PAINE, AGE OF REASON (1794). The disestablishment clauses in the early American state constitutions—*see*, for example, N.C. CONST., art. XXXIV (1776) —and the Establishment Clause of the First Amendment both reflect the emerging nation's interest in depoliticizing religion. It should be recalled that seven of the clergy disqualification clauses—including the North Carolina clause from which the Tennessee clause was immediately derived according to the Tennessee Supreme Court—were adopted between 1776 and 1778. Their adoption *preceded* the Establishment Clause of the First Amendment by more than a decade. The clergy disqualification clauses adopted by states in their first state constitutions in the wake of the Declaration of Independence were doubtless intended to reinforce parallel state disestablishment or free exercise policies. For example, the disestablishment and clergy disqualification clauses appear in the same article of the first Delaware Constitution. *See* DEL. CONST. of 1776, art. 29. The North Carolina clergy disqualification clause (upon which the Tennessee clause is reputed to have been based) "copied with slight changes" from the earlier Delaware clause. E. Ketcham,

"The Sources of the North Carolina Constitution of 1776" 6 N.C. HIST. REV. 229 (1929). Most of the seven states adopting clergy disqualification clauses between 1776 and 1778 also contemporaneously adopted policies disestablishing the church or permitting free exercise of religion, at least for protestant Christians. Policies of disestablishment or free exercise were adopted in DEL. CONST., art. 29 (1776) (disestablishment); N.C. CONST., art. XXXIV (1776) (disestablishment); N.Y. CONST., art. XXXVIII (1777) (free exercise); VA. CONST., sec. 16 (1776) (Bill of rights) (free exercise), GA. CONST., art. LVI (1777) (free exercise). *But see* S.C. CONST. art. XXXVIII (1778) (establishment of Christian Protestant religion); *cf.* MD. CONST., art. XXXIII (1776) (allowing tax for support of Christian religion). Massachusetts had an established church as late as 1833, MASS. CONST. of 1780, art. III, *as amended*, art. of am. XI (1833), but by the mid-nineteenth century, disestablishment policies had taken root in each of the United States. The clergy disqualification clauses could be justified as interim measures intended to insure the success of state disestablishment or free exercise policies. Once the success of state disestablishment policies was assured, most states could and did repeal their clergy disqualification clauses. Whatever legitimacy clergy disqualification clauses may have claimed during the precarious revolutionary and post revolutionary period when the states were first attempting to promote their policies of disestablishment was negated by the success of the disestablishment and free exercise policies in the United States. When the success of disestablishment became assured, the clergy disqualification clauses lingered in the state constitutions as anomalies, the useful life of which had been spent. Today, Tennessee's clergy disqualification clause alone remains—a historical curiosity which has wandered almost by chance into the twentieth century.

Whatever secondary purpose may have been assumed by the clergy disqualification clauses—for example, the political exclu-

sion of a class of persons, namely ministers, disposed to question slavery—though arguably never legitimate, ceased to have meaning after the Civil War. *But cf.* appellant's counter complaint at par. 9, Juris. Statement A.58.

Perhaps one other historical explanation can be offered for the adoption of clergy disqualification clauses by the states in the early years of the Republic. The unremitting civil strife in England born of the involvement of the Established Church in civil government had produced an important philosophical reaction. One of the most important philosophical influences on political leadership in the United States in the revolutionary period was John Locke. *See* C. BECKER, THE DECLARATION OF INDEPENDENCE 27 (1922). Support for the policy of clergy disqualification can be found in the writings of John Locke. Rigid separation between civil government and religion had been urged by John Locke in 1689:

> I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls and, on the other side, a care of the commonwealth. J. LOCKE, 6 WORKS 9 (1823)

Locke's ideal commonwealth was a "society of men constituted only for the procuring, preserving and advancing their own civil interests." *Ibid.* Locke favored limitation of the jurisdiction of the magistrate or public officer to "civil concernments" and denied the civil magistrate any role in the "care of souls." *Id.* at 10. Correspondingly, he argued that the authority of the clergy

> . . . ought to be confined within the bounds of the church, nor can it in any manner be extended to civil affairs; because the church itself is a thing absolutely separate and distinct from the commonwealth. The boundaries on both sides are fixed and unmovable. He jumbles heaven and earth together, the things most remote and opposite, who mixes these societies, which are, in their original, end, business and in everything perfectly distinct, and infinitely different from each other. *Id.* at 21.

He argued that the "magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws," *Id.* at 11-12.

Locke was of the opinion that the "only business of the church" should be "the salvation of souls." *Id.* at 30. Locke, whose views had apparently been attacked as anti-clerical or anti-religious, protested that he was more a friend to the clergy and their calling "than those amongst them who show their forwardness to leave the word of God to serve other employments." *Id.*, at 172. Locke declared that the office of a minister of the Gospel requires "the whole man" and that

> . . . such busy men as cannot be content to be divines without being laymen too, would so little keep up the reputation which ought to distinguish the clergy, or preserve the esteem due a holy, i.e., a separate order; that nobody can show greater good-will to them than by taking all occasions to put a stop to any forwardness to be meddling out of their calling. This, I suppose, made a learned prelate of our church out of kindness to the clergy, mind them of their stipulation and duty in a late treatise and tell them that "the pastoral care is to be a man's entire business, and to possess both his thoughts and his time" *Id.* at 173 [Locke's reference was to the DISCOURSE OF PASTORAL CARE published in 1692 by Gilbert Burnet, Bishop of Salisbury.]

Thomas Jefferson himself could have been induced to support a clergy disqualification policy—a position he later re-

pudiated—in part as a result of the influence of John Locke. The early American clergy disqualification clauses, including that of Tennessee, bear close resemblance to the philosophical position and, indeed, even to the phraseology of John Locke. The important qualification which should be made is that Locke's position, while perhaps a preferred alternative to the intertwined, if not incestuous, relationship between the Established Church and civil government in England in the seventeenth century is but an ill-suited and incongruous transplant twentieth century America. Whatever merit the rigid separation of the civil and ecclesiastical policies into mutually exclusive spheres of influence may have offered as a means of limiting the excesses of the still powerful Established Church in seventeenth century England, it is plain that such a policy has little merit today. The clergy disqualification policy has been rendered superfluous by the success of our country's policy of disestablishment. Equally important, the clergy disqualification clauses were based upon Locke's premise—certainly erroneous today—that clergy are incapable of dividing their ecclesiastical concerns from their secular responsibilities as citizens.

2. **Clergy disqualification for civil offices in the United States other than Tennessee.**

A. Virginia

Precedent for the clergy disqualification clause in the Virginia Constitution of 1776 was established in the colonial law of the commonwealth. At the grand assembly of July 5, 1653, it was ordered that

> . . . Mr. Robert Bracewell, Clarke, be suspended, and is not in a capacitie of serving as a Burgesse, since it is vnpresidentiall, and may produce bad consequences. 1 HENNING'S VA. STATUTES AT LARGE 378 (1823).

The notation appearing in the margin next to the exclusion reads: "Minister of the gospel suspended and declared ineligible to a seat in the house of burgesses" *Ibid.* At least one other minister was excluded after Bracewell. In 1699, Rev. John Waugh was excluded from the Virginia assembly. VA. H. JOUR. 140 (H. McIlwaine ed.)

A possible explanation for the adoption of the clergy disqualification clause by the Virginia constitutional convention of 1776 is contained in house debates on the exclusion of a minister from the Virginia legislature in 1827. A committee of Privileges and Elections presented a report to the House in 1827 which contained the reasons believed by the committee for the adoption of the clergy disqualification clause in 1776.

The report set forth the following explanation:

> It is certain that our civil rights have no dependence on our religious opinions, and it is also certain, that our ancestors knowing this, intended to keep separate Church and State. No mode was calculated more certainly to effect this object, than by denying participation in civil government, to all those, whose high and influential stations gave them opportunity by preaching, of working upon and inflaming the minds of their sects, and bringing with them into councils of the nation, all the prejudices which might be engendered under circumstances of high sectarian feeling in church matters. Should the advocates and orators of two distinct sects obtain possession of our Legislative Hall, the wants of the great body of the people would soon be merged in the agitation of theological subjects and when victory gave the palm to one or the other, "the presumption of such ecclesiastical legislators and rulers, though themselves fallible and uninspired men, would assume dominion over the faith of others, setting up their own opinions and mode of thinking as the only true and infallible; and as such, would

endeavor to impose them on the country. We should be compelled to furnish contributions of money for the propagation of opinions in which we did not believe, and forced to support a teacher of a particular religious persuasion, instead of the comfortable liberty of contributing to a pastor, whose morals we would make our pattern, and whose powers we felt most persuasive to righteousness." VA. H. JOUR., Feb. 2, 1827 (microfilm).

Soon after the adoption of the constitution, the provision excluding the clergy was applied to John Corbley, of Monongalia, in 1777. When the matter was raised in the House, Corbley admitted being a minister of the gospel but claimed that he received no money for performing his function. Nevertheless, he was still excluded. VA. H. JOUR., Nov. 1, 1777.

In 1783, Thomas Jefferson, being dissatisfied with the Virginia Constitution of 1776, prepared a draft of a new Virginia Constitution which contained a clergy disqualification clause. 6 PAPERS OF THOMAS JEFFERSON 297 (J. Boyd ed., 1952). Although no constitution was adopted by Virginia in 1783, Jefferson's clergy disqualification clause evoked opposition from James Madison. In 1788, Madison wrote "Remarks on Mr. Jefferson's Draught of a Constitution," which contained the following passage:

> Does not the exclusion of Ministers of the Gospel as such violate the Fundamental principle of liberty by punishing a religious profession with the privation of a civil right? does it not violate another article of the plan itself which exempts religion the cognizance of civil power: does it not violate impartiality by shutting the door against the Ministers of one religion and leaving it open for those of every other. 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON (1865).

By 1800, Jefferson had reversed his position concerning the clergy disqualification clause. In a letter to Jerimiah Moor,

Jefferson recounted the reasons for his earlier view and why he changed:

> In the scheme of the constitution of Virginia which I prepared in 1783, I observe an abridgement of the right of being elected which after 17 years more experience and reflection, I do not approve. It is the incapacitation of clergymen from being elected. The clergy, by getting themselves established by law, and ingrafted into the machine of government, have been a very formidable engine against the civil and religious rights of man. They are still so in many countries, and even in some of the U.S. Even in 1783 we doubted the stability of our recent measure for reducing them to the footing of other useful callings. It now appears that our means were effectual. The clergy here seem to have relinquished all pretensions to privilege, and to stand on a footing with lawyers, physicians, etc. They ought, therefore, to possess the same right. 9 WORKS OF JEFFERSON 143 (P. FORD ed., 1905)

The controversy which arose in 1827 concerning the eligibility of Mr. Humphrey Billups to serve in the legislature ended in his exclusion. Mr. Billups asserted that since he was only a deacon in the Methodist Church and was not authroized to "dispense the word, the Sacraments, and other Holy Orders," VA. H. JOUR., Feb. 2, 1827 (microfilm), he was not a minister within the meaning of the clause; and therefore, he should not be excluded from the legislature. Mr. Billups' argument failed, and the House affirmed the Committee of Privileges and Election resolution that "Humphrey Billups, a Delegate returned from the county of Mathews, is a Minister of the Gospel within the true spirit and intent of the 14th Article of the Constitution, and therefore not entitled to a seat in the present House of Delegates." *Ibid.*

The reasons argued for omitting the clergy disqualification clause at the 1867-68 Virginia Constitutional Convention cen-

tered on the moral character of clergymen and the legislature. According to one of the delegates of the convention:

> You cannot degrade such men [clergymen] by engaging them in the conduct of your affairs, nor can you drag them down into the filth of politics. On the contrary, if listened to and respected, they will lift you and all of us out of that filth, and dignify and ennoble every branch of business which may be entrusted to their care, to their guidance and direction. Nothing has more tended to our degradation in morals than the practice, in this state of excluding good men from office, to give place for drunkards and libertines. JOUR. OF VA. CONST. CONV., Jan. 16, 1868 (remarks of Mr. President) (microfilm).

The Virginia Constitutional Convention of 1867-1868 omitted the clergy disqualification clause, and it has not been readopted in any subsequent Virginia constitutions.

B. KENTUCKY

Two plausible explanations can be given for the adoption of the clergy disqualification clause in the 1792 Kentucky constitution: (1) exclusion of a class of persons, namely ministers, unfavorably disposed to slavery and (2) imitation of the English model.

The 1792 constitutional convention of Kentucky was a hotbed of controversy centered on the issue of slavery. Six members of the convention were ministers of the gospel—Rev. George Smith, Rev. James Crawford, Rev. John Bailey, Rev. Benedict Swope, Rev. James Garrad and Rev. Charles Kavanaugh. JOUR. OF KY. CONST. 10 (1792) (microfilm). On April 18, 1792, the ministers attempted unsuccessfully to expunge the slavery article from the constitution. *Ibid.* On the same day, a provision

prohibiting members of congress from serving in the state legislature was amended to disqualify ministers of religious societies. *Ibid.*

Based on these facts, it is plausible that the clergy disqualification clause was adopted for the purpose of excluding a class of persons, namely ministers, who might be inclined to question the South's peculiar institution—slavery. Oddly enough, all the ministers voted for the provision to exclude themselves. B. YOUNG, CONSTITUTIONS OF KENTUCKY AND THEIR HISTORY 36-37 (1890). It is suggested that the ministers "considered it a mark of deference that . . . a really righteous man was too good to be a member of even an average legislature." G. Willi "History of Kentucky Constitutions and Constitutional Conventions" 28 KY. HIST. SOC. REG. 315 (1930).

According to one of the delegates to the Kentucky Convention of 1890 which deleted the clergy disqualification clause from the Kentucky Constitution, the original clause was attributable to imitation of the English model:

> [W]e had only been separated from Great Britain a short time and the attachment for the institutions of that country remained with our forefathers who modeled our institutions after theirs, so far as they were applicable to a republic. When they examined the law with reference to the House of Commons, it was found to exclude clergymen, hence they concluded to follow that precedent and exclude them from the legislature. JOUR. OF KY. CONST. 3849 (Feb. 19, 1890) (remarks of Mr. Kennedy) (microfilm).

See N.S. Shaler, KENTUCKY: A PIONEER COMMONWEALTH 122 (1888).

According to another delegate of the Kentucky Convention of 1890, the clergy disqualification clause was readopted in 1850

because "[i]t was well known that the most prominent ministers of the state of Kentucky were for emancipation and hence that led to the Convention of '49 to exclude ministers from holding offices." JOUR. OF KY. CONST. 3855 (Feb. 19, 1890) (microfilm) (remarks of Mr. Petrie).

The opponents of the clergy disqualification clause set forth several arguments for the clause's repeal: (1) the British model of excluding clergy from the House of Commons was not for the purpose of "separating Church and state, . . . but because, under the law of England, he [the clergyman] was considered already as holding an office, being a member of one of the ecclesiastical courts of the kingdom." *Id.* at 3849 (remarks of Mr. Kennedy) Also, bishops were *ex officio* members of the House of Lords *Id.* at 3853 (remarks of Mr. Farmer); (2) Unlike the powerful Church of England, the clergy in this country are divided into various denominations and "whatever our theories may be, that the danger is a nullity, and does not exist that any church will gain the preponderance in this country." *Ibid* (remarks of Mr. Farmer); (3) Whenever a man is denied the right to hold public office "we place a ban and inflict a punishment upon him, which according to the policy of our government should only be inflicted upon the vilest criminal." *Id.* at 3850 (remarks of Mr. Kennedy).

In response to these arguments, the proponents of the clergy disqualification clause asserted: (1) that their opponents' arguments "would be just as good in favor of woman suffrage as it would for allowing the priest and preachers to hold a seat in the legislature." *Ibid.* (remarks of Mr. Strauss); (2) Ministers would make unwise legislators because "the very nature of their profession, of their reading and education, and all their associations unfit them as a class to engage in the making of laws." *Ibid.* (remarks of Mr. Strauss); and (3) if ministers are allowed to sit in the legislature, "you break down that separation, which

all writers upon the subject of free government content is absolutely necessary both for religious and civil liberty." *Id.* at 3851 (remarks of Mr. Strauss).

C. South Carolina

The 1778 South Carolina Constitutional convention adopted a clergy disqualification clause, apparently because of the hostility between the Presbyterians and the Episcopalians, the established church in South Carolina. A speech by the Presbyterian minister, William Tennant, who was opposed to the establishment of the Episcopal Church, is credited with swaying the assembly in favor of disestablishment in 1778. D. WALLACE, II THE HISTORY OF SOUTH CAROLINA 169 (1934).

A contemporary source attributes the South Carolina clergy disqualification clause in large part to Episcopal reaction to Tennant and his disestablishment victory. The diary of Timothy Ford relates:

> I am told that it [the clergy disqualification clause] got a place in the constitution chiefly to exclude one parson Tennant (a presbyterian) and who opposed with great eloquence and finally with success the attempts that were made to establish hierarchy and fix the episcopalians as the only Legal and Supreme Church in this country. "Diary of Timothy Ford." [1785], 13 S.C. HIST. AND GEN. MAG. 197 (1912).

D. Maryland

According to a delegate at the 1864 Maryland Constitutional Convention, the probable reason for the adoption of the clergy disqualification clause by the 1776 Maryland Constitutional Convention was that church and state should be separated, and

the clergy disqualification clause was one of the measures for this purpose. JOUR. OF MD. CONST. CONV. 792 (July 9, 1864) (remarks of Mr. Chambers) (microfilm).

E. North Carolina

In the North Carolina Constitution of 1776, the adoption of the clergy disqualification clause was anomalous since Dr. David Caldwell, a clergyman, was a "member of the Congress which framed the constitution and other clergymen did much for the Revolutionary cause." W. BOYD, A HISTORY OF NORTH CAROLINA 145 (1919). Another authority states that the clergy disqualification clause was "copied with slight changes . . . from the constitution of Delaware, which had been adopted September 21, 1776 . . ." E. Ketcham, "The Sources of the North Carolina Constitution of 1176," 6 N.C. HIST. REV. 229 (1929). At least three clergymen have been excluded from the North Carolina legislature. In 1801 John Culpepper and William Taylor were excluded from the state senate, while Josiah Crudup was excluded from the state senate in 1820. F. GREEN, CONSTITUTIONAL DEVELOPMENT OF THE SOUTH ATLANTIC STATES: 1776-1860, at 183 (1966).

F. Georgia

In Georgia, the clergy disqualification clause in the 1776 Georgia Constitution may have been directed at Reverend John Zubly, who had left the Continental Congress to change sides and become a loyalist. E. WARE, CONSTITUTIONAL HISTORY OF GEORGIA 37 (1947). John Witherspoon, President of Princeton,

> . . . who had been a forceful member of the Continental Congress, and himself a Presbyterian minister . . . did not like the idea for excluding clergymen as such from public office. When the matter was being vigorously discussed because to this effect taken by the state of Georgia, he wrote a protest to one of the financial papers of the state. A. STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 624 (1950).

In his letter, which is reprinted *id.* at 624-25, Witherspoon argues forcefully against Georgia's clergy disqualification clause. His eloquent arguments have lost none of their persuasiveness:

> . . . Now suffer me to ask this question: Before any man among us was ordained a minister, was he not a citizen of the United States, and if being in Georgia, a citizen of the state of Georgia? Had he not then a right to be elected a member of the assembly, if qualified in point of property? How then has he lost, or why is he deprived of this right? Is it by offence or disqualification? Is it a sin against the public to become a minister? Does it merit that the person who is guilty of it should be immediately deprived of one of his most important rights as a citizen? Is not this inflicting a penalty which always supposes an offence? Is a minister then disqualified for the office of a senator or representative? Does this calling and profession render him stupid or ignorant? I am inclined to form a very high opinion of the natural understanding of the freeman and freeholders of the state of Georgia, as well as of their improvement and culture by education, and yet I am not able to conceive, but that some of those equally qualified, may enter into the clerical order: and then it must not be unfitness, but some other reason that produces the exclusion. Perhaps it may be thought that they are excluded from civil authority, that they may be more fully and constantly employed in their spiritual functions. If this had been the ground of it, how much more properly would it have appeared, as an order of an ecclesiastical body with respect to their own members. In that case I

should not only have forgiven but approved and justified it; but in the way in which it now stands, it is evidently a punishment by loss of privilege, inflicted on those who go into the office of the ministry; for which, perhaps, the gentlemen of Georgia may have good reasons, though I have not been able to discover them. Id. at 624-25.

Witherspoon's attacks on the Georgia clergy disqualification clause provide additional support for appellant's vagueness claim. *See* Juris. Statement at 27-28. Witherspoon reasoned:

> But besides the uncertainty of the principle on which this resolution is founded, there seems to me much uncertainty as to the meaning of it. How are we to determine who is or is not a clergyman? Is he only a clergyman who has received ordination from those who have derived the right by an uninterrupted succession from the apostles? Or is he also a clergyman, who is set apart by the imposition of hands of a body of other clergyman, who has exhorted in a methodist society, or spoken in a quaker meeting, or any other religious assembly met for public worship? There are still greater difficulties behind:—Is the clerical character indelible? There are some who have been ordained who occasionally perform some clerical functions, but have no pastoral charge at all. There are some who finding public speaking injurious to health, or from other reasons easily conceived, have resigned their pastoral charge, and wholly discontinued all acts and exercises of that kind; and there are some, particularly in New England, who having exercised the clerical office some time, and finding it less suitable to their talents than they apprehended, have voluntarily relinquished it, and taken to some other profession, as law, physic, or merchandize—Do there all continue clergymen, or do they cease to be clergymen, and by that cessation return to, or recover the honourable privileges of laymen? A. STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 625 (1950).

G. New York

The adoption of the clergy disqualification clause in the 1777 New York constitution according to one authority was one of several measures to obtain separation of church and state in New York.

> When the Convention began the consideration of a plan or frame of government for the new state, the established church was one of the institutions of the colony. It formed a most important part of the colonial Constitution, and, because of the union of church and state then existing, the church was as much under the fostering care of the government as any other department of colonial affairs. The governor had power to appoint ministers to local churches, and he was directed to procure the removal of any minister who might give scandal by his doctrine or manners . . . [A]n examination of the legislative records shows that ecclesiastical affairs frequently engaged the attention of the colonial legislature. The first constitutional convention determined on a separation of church and state, not only by adopting the policy of universal religious toleration, but also by adopting a provision excluding ministers from the right to hold civil offices, and (article 35) by expressly abrogating and rejecting all parts of the common law or statutes which "may be construed to establish and maintain any particular denomination of Christians or their ministers. C. LINCOLN, 1 THE CONSTITUTIONAL HISTORY OF NEW YORK 543 (1906).

The clergy disqualification provision was readopted in the 1821 New York constitution; however, delegates at the 1846 New York constitutional convention argued that the exclusion of clergymen from the legislature was an "odious distinction," and the provision was discontinued. C. LINCOLN, 2 THE CONSTITUTIONAL HISTORY OF NEW YORK 111 (1906).

3. **Disqualification of clergy for civil office in Tennessee.**

A prominent constitutional historian of Tennessee has observed that

> . . . The institutions of Tennessee are of purely English origin. There is nothing in Tennessee, considered as a political organization, which is not traceable directly to England. J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 79 (1895)

The influence of English law on the institutions of Tennessee is likewise apparent from Tennessee's reception of the common law through North Carolina. *See* N.C. ACTS, c. 5, sec. 2 (1778) and *Moss v. State*, 131 Tenn. 94, 173 S.W. 859 (1915). The influence of English practice on the Tennessee Constitutional Convention of 1796 was manifest:

> The first two of the fourteen rules of order adopted by the convention allowed the members to sit in their places with their heads covered when the President was in the chair, affording a curious illustration of the survival of the habit of the British Parliament, originally intended, I suppose, to assert, in a somewhat aggressive and unnecessary form, the dignity of its members. E. Sanford, "The Constitutional Convention of 1796," 1896 BAR ASSOC. OF TENN. 92, at 106 (hereinafter cited 1896 TENN. BAR PROCEEDINGS).

It has been observed that

> . . . the Constitution of 1796 was not in any sense a new creation, but was the result of logical and gradual growth, and, in fact, but the adaptation and modification, to suit changed conditions, of constitutional principles with which the members of the convention had long been familiar. . . .

> It was but natural then, that, in casting about for material, they should have seized that which lay closest at hand: the Constitution which had been adopted by North Carolina in the year 1776. . . .
>
> It was a Constitution under which they themselves had lived for the intervening fourteen years between 1776 and the creation of the Territorial Government in 1790. . . . *Id.* at 108-09.

Unfortunately, the debates of the Convention

> . . . are not given in the Journal. They are not to be found elsewhere. Accounts, therefore, of its more minute transactions are meagre. . . . J. RAMSAY, THE ANNALS OF TENNESSEE 652 (1853)

The only extant legislative history of the clergy disqualification clause of the Tennessee Constitution of 1796 is from the journal and is, indeed, meagre. A draft of a proposed Constitution was presented to the Convention at Knoxville on January 30, 1796 which included the following:

ARTICLE VIII

> SEC. 1. Whereas the ministers of the gospel are, by their professions, dedicated to God and the cure of souls, and ought not to be diverted from the great duties of their functions; therefore no minister of the gospel, or priest of any denomination whatever, shall under any pretence or description be eligible to, or capable of holding any civil or military office or place of trust within this state.
>
> SEC. 2. No man belonging to any sect or denomination of religion, the tenets of which are known to be opposed to the bearing of arms, shall be liable to be fined for non attendance at general or private musters. JOUR. OF TENN. CONST. CONV. OF 1796 at 18 (1852)

On February 2, 1796, the convention amended the proposed clergy disqualification clause as follows:

> Mr. Carter moved, and was seconded by Mr. Jackson, that the words at any time hereafter, under any pretence or description whatever be eligible to, or capable of holding any civil or military office, or place of trust within the state,' in the first section of the eighth article, be struck out, for the purpose of inserting the following; 'be eligible to a seat in either branch of the legislature, which carried in the affirmative. *Id.* at 23.

The Tennessee clergy disqualification clause, as amended, was approved by the unlimited "Constitutional Conventions of 1835 and 1870 . . . and ratified by a vote of the people of Tennessee." *Paty v. McDaniel*, 547 S.W. 2d 897 at 902 (1977). For the effect of ratification by a vote of the people of Tennessee on the validity of Tennessee's clergy disqualification clause *cf. Reitman v. Mulkey*, 387 U.S. 369 (1967). Tennessee's clergy disqualification clause remains in force today, subject to the stay granted appellant by Mr. Justice Stewart on July 6, 1977 and the Court's disposition of this case.

The amendment of February 2, 1976 limiting the applicability of the clergy disqualification clause to eligibility for a seat in either branch of the legislature had the effect of conforming Tennessee clergy disqualification policy to the practice prevailing under the English common law. Imitation of the English model or the clergy disqualification clauses in the constitutions of other states is one plausible explanation of Tennessee's clergy disqualification clause. It has been authoritatively suggested that the "same cautious adherence to English precedents in state-making was naturally exhibited [in Tennessee at the 1796 convention as] everywhere in America." J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 90 (1895). Imitation of the English model may afford a satisfactory explanation—it does not afford a sufficient reason. If imitation of the English model be the true explanation of Tennessee's clergy disqualification clause, one is compelled to accept the conclusion of Joshua Caldwell that

> . . . the people [of Tennessee in 1796] were thoroughly democratic in sentiment, but they had not the experience or the confidence to assert themselves." *Ibid.*

The legislative history of the convention of 1796, limited though it is, does permit several inferences relevant to establishing legislative purpose. First, the convention itself was less apprehensive of the danger of clerical participation in civil society—less "anti-clerical", if you will—than the drafting committee. This is apparent in that the drafting committee was willing to exclude the clergy from the exercise of any temporal authority. *Accord*, 6 CHARLES I, c. 27 (1641). *See also* J. LOCKE, 6 WORKS 21 [1689] (1823). The 1796 convention was content to adopt the practice of the English common law subsequent to 13 CHARLES II c. 2 (1661). Second, the convention was less tolerant of the free exercise of religion than was the drafting committee. This can clearly be seen in the deletion of section 2 of Article VIII as proposed in the draft January 30, 1796, and its replacement by the following clause which, like the clergy disqualification clause, remains in force in the present Tennessee constitution:

> No atheist shall hold a civil office—no person who denies the being of God, or a future state of rewards and punishments shall hold any office in the civil department of this State.

But see Torcaso v. Watkins, 367 U.S. 488 (1961). Interestingly, Caldwell has interpreted the disqualification of atheists from civil office in Tennessee as a "tacit permission to unbelievers to take the lead in the military service." J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 95 (1895).

The placement of clauses disqualifying clergy from legislative office and atheists from any civil office plainly suggest that the intent of the convention of 1796 was to fence out certain portions of the electorate from full participation in civil government because of their religious views or conduct. One of the most important functions of the equal protection clause today is to prohibit the states from making such invidious classifications which impinge upon the fundamental voting rights of our citizens. Plainly, the 1796 convention intended to penalize both ministers and atheists for their free exercise of religion. The exclusion of both extremes of the religious spectrum —clergy and atheists—has the effect of establishing a state imposed religious orthodoxy inconsistent with the Establishment Clause of the First Amendment. The state of Tennessee has sought to encourage "safe-thinking" views in matters of religion through the sanction of deprivations of the nonconforming citizens' fundamental rights of free exercise, speech, association and voting.

The argument that the clergy disqualification clause of 1796 is an establishment of religion incompatible with the First Amendment is compelling. To be sure, the Scotch-Irish Presbyterians who convened in Knoxville in 1796 were by no means interested in establishing the Church of England. But their limited peripheral vision in matters of religion can be seen both in Rev. Houston's draft of the "Frankland" constitution and in the 1796 convention's exclusion of atheists from civil office. Even Rev. Houston's draft excluded the clergy from legislative office. The exclusion of clergy from civil affairs was an article of faith for the Presbyterian followers of Calvin and Knox at the 1796 Tennessee Convention just as it had been for the bishops of the Established Church of England. In his "Brief Exhortation to England for the Speedy Embracing of the Gospel" in 1558 John Knox cited the twentieth chapter of *Matthew* in admonishing that "Ministers of the Word ought not to exercise any civil

office, or to be intangled with the affaires of the Realme." 5 WORKS OF JOHN KNOX 519 (D. Laing, ed. 1966). Knox declared:

> Let none that be appointed to labour in Christes vineyearde be entangled with Civil Affaires, (and, as ye call them, the affaires of the Realme,) except it be when the civil magistrate and ministers of the Worde assemble together, for execution of discipline, which is a thing easie to be done, without withdrawing any person from his charge, if that which is before expressed be observed. For, as touching their yearly commynge to the Parliament, for matters of religion, it shall be superfluous and vaine; if God's true religion be so once established, that after it be never called in controversie. *Ibid.*

The Tennessee clergy disqualification clause also violates the Establishment Clause because it gives a sectarian preference to those religions the beliefs or ecclesiastical regulations of which exclude clergy from civil office. The clause likewise imposes a sectarian penalty upon religious groups such as appellant's which are neutral as to clergy candidacy for civil office.

More than eighty years ago a distinguished member of the Tennessee bar argued that the political exclusion of clergy and atheists conflict with the guarantees of section four of the Tennessee Constitution's Declaration of Rights respecting the free exercise of religion and prohibiting the use of religious tests as a qualification to any office or public trust under the state of Tennessee. *See* J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 94 (1895).

The Tennessee Supreme Court, citing Joshua Caldwell as an authority, conceded that Tennessee's clergy disqualification clause was "almost totally derived from the 1776 North Carolina Constitution and the 1784 Constitution of the lost state of

Franklin."[16] *Paty v. McDaniel*, 457 S.W. 2d 987, at 907 (1977). One really need look no further than the fine 1895 work of Joshua Caldwell, whose less scholarly 1907 edition directed to the Tennessee history high school textbook market, was cited by the Tennessee Supreme Court, *ibid.*, to respond effectively to Tennessee court's holding:

> On the subject of religious liberty, it may be added that the Constitution of North Carolina, which was adopted by Franklin, with a few amendments, has in its thirty-second section the following words: "That no person who shall deny the being of God, or the *truth of the Protestant religion*, or the divine authority of either the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State." This was the law of our territory so long as it remained a part of North Carolina. And unless the provision was omitted from the Constitution as recast by Franklin, there certainly was a deliberate and most unjust limitation of religious liberty on the soil of Tennessee and by a law made by its own people. It is improbable that this section was omitted. A more stringent requirement was proposed in the Houston Constitution, and the Carolina provision is in accord with the temper of the religious leaders of Franklin. J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 96 (1895) (emphasis in original).

Section 32 of the Franklin Constitution to which Caldwell referred followed immediately the clergy disqualification clause

[16] The "lost State of Franklin" refers roughly to the territory in the eastern portion of Tennessee between 1784, when its settlers declared their independence from North Carolina, and 1790, when this area was included in the Territory of Tennessee. *See* J. RAMSEY, ANNALS OF TENNESSEE 282-336 (1853).

with which it must have been so closely associated at the Jonesboro convention of 1784. The clergy disqualification clause in the Jonesboro Constitution, in substance and style, was patterned upon the North Carolina constitution of 1776:

> Sec. 31st. That no Clergyman or preacher of the gospell of any denomination shall be capable of being a Member of either the Senate or house of commons while he continues in the service of the pastoral function. FRANKLIN CONST. of 1784, 9 AM. HIST. MAG. 406 (1904).

The Tennessee court concluded: "If any burden can be said to be imposed upon the exercise of religion, it is indirect, miniscule, and does not make unlawful any religious practice." *Paty v. McDaniel*, 457 S.W. 2d 987 at 905 (1977). An appropriate response to this line of reasoning was given by Joshua Caldwell, in his comments on the Franklin Constitution declared:

> It will be observed that freedom of opinion was not restricted, directly. One was at liberty to believe anything, but only the Protestants had the right of civil preferment. It can not be maintained that there was religious liberty where such a law prevailed, and there can be but little doubt that it prevailed in Franklin. *Id.* at 95-96.

Caldwell's conclusion that the Constitution of 1796 "did establish unlimited liberty," whether made for reasons of tact or respect for the framers, then long dead, was based upon two premises: first, that he "could not recall any suggestion, even, of the exclusion of a citizen from office on account of his religious opinions;" and, second, that the constitution of 1796 although it "did not go so far as the very advanced religious or irreligious thought of the present time demands may be true; but . . . [c]onsidered with reference to the conditions of the time, it was exceptionally liberal . . ." *Ibid.* Although the present Tennessee constitution does not adopt the Franklin constitution's

civil preferment for Protestants, the civil preferment it gives to non-clergy and non-atheists strike equally at the heart of the fundamental rights of voting, political candidacy and free exercise of religion.

Just as Caldwell attacked the Tennessee clergy disqualification clause for its inconsistency with the religious test clause of section four in the Tennessee Constitution's Declaration of Rights, *id* at 95-96, appellant has urged the invalidity of Tennessee's clergy disqualification clause upon the force of the religious test clause of U.S. Const. art. VI, cl. 3. *See* Juris. Statement at 28-30.

In contrast to the harmony of the 1796 convention, the adoption of the Franklin constitution was marked by bitter conflict. The events of the controversial Franklin conventions must have been fresh in the minds of the delegates to the 1796 convention.

The controversy over the adoption of the Franklin constitution centered to a considerable extent on the qualifications for members of the legislature. Rev. Sam Houston proposed a constitution for "Frankland", the House of Representatives of which

> . . . [sec. 2] shall consist of persons most noted for wisdom and virtue. . . .
>
> . . . [sec. 3] And no person shall be eligible or capable to serve in this or any other office in the civil department of this State, who is of an immoral character, or guilty of such flagrant enormities as drunkenness, gaming, profane swearing, lewdness, sabbath breaking and such like or who will, either in word or writing, deny any of the following propositions, *viz.*:
>
> 1st. That there is one living and true God, the Creator and Governor of the universe.

> 2d. That there is a future state of rewards and punishments.
>
> 3d. That the scripture of the Old and New Testaments are given by divine inspiration.
>
> 4th. That there are three divine persons in the Godhead, co-equal and co-essential.
>
> And no person shall be a member of the House of Representatives who holds a lucrative office either under this or other States . . . or minister of the gospel, or attorney at law, or doctor of physic. J. RAMSEY, ANNALS OF TENNESSEE 326-27 (1853).

See also E. Sanford "The Constitutional Convention of 1796". 1896 PROCEEDINGS OF TENN. BAR ASSOC. 109-10.

Ramsay describes the events that followed upon the introduction of the Rev. Houston's proposed constitution for Franklin:

> . . . . new elements of strife had arisen during the session of the convention, and new topics of discussion had been thrown out amongst the people. The dissentients comprised in their number, much of the wisdom and virtue of the body to which they belonged; and desirous of sustaining themselves with their constituents, they published an account of their proceedings, together with the rejected form of government, and appealed again to the people. Here, as might have been anticipated, sectarian bigotry, unlettered ignorance, and impassioned ultraism, would all tend to aggravate the existing discord and embitter the dispute. [Some sections, including the sections relating to qualifications for members of the House of Representatives] . . . became prolific sources of controversy and angry debate. The deputies in convention had dissented; their constituents themselves could not harmonize; and without any further effort to remodel the govern-

> ment, the people at length acquiesced in the constitution of the mother state. J. RAMSEY, ANNALS OF TENNESSEE 336 (1853).

An explanation of the religion clauses in the 1796 constitution and of the bitter religious disputes generated by the adoption of the Franklin constitution in the context of the predominant religious values of the Tennessee frontier at the close of the eighteenth century can be found in J. Henneman, "Recent Tennessee History by Tenresseans" 4 SEWANEE REV. 439, at 448-58 (1896).

The argument for excluding appellant from the 1977 limited constitutional convention of Tennessee is even more difficult to sustain than the argument for excluding clergy from the legislature. State constitutional conventions are the people assembled to establish the rules by which civil society shall be governed. Only if the clergy were not subject to the governance of or otherwise affected by civil society could their exclusion from a constitutional convention be ethically justified. It will be observed that ministers participated as convention delegates in many of the conventions which adopted constitutions excluding ministers from certain civil offices. The arguments of John Locke that the clergy are beyond the pale of civil society are no more suited to our situation than were

> . . . the famous and impossible "Fundamental Constitutions" which were conceived by the great empirical philosopher, John Locke, and which formulated probably the worst scheme of government that ever was committed to writing. J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 76 (1896).

CONCLUSION

Counsel respectfully requests that the decree and opinion of the Tennessee Supreme Court be reversed and this case be remanded with direction that judgment be entered for appellant and that appellant be awarded costs, including reasonable attorney fees. The Tennessee clergy disqualification clause considered in the historical context of the English common law and the similar provisions in the law of other states amounts to an establishment of religion. The clause cannot be justified, as the Attorney General of Tennessee argues, upon the secular state interest in the maintenance of separation of church and state. Such a rigid state doctrine of separation impermissably deprives appellant of his fundamental civil rights to vote and be a candidate for public office secured by the Equal Protection Clause of the Fourteenth Amendment for exercising his fundamental right of free exercise of religion. Authority relied upon by the Attorney General to support the power of the state to regulate religious *action* as opposed to *belief* falls short of the mark because the religious *action* here, like the religious *action* in *Barnette* and *Yoder*, is protected. Moreover, countervailing social interests in health and safety are not implicated here, as they were in *Reynolds*, *Prince* and *Pack*. For these reasons, appellant urges that he be awarded judgment, including costs and reasonable attorney fees.

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